

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3854 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

L J KALOTARA

Versus

DISTRICT JUDGE

Appearance:

MR IS SUPEHIA for Petitioner
M/S MG DOSHIT & CO for Respondent No. 1, 2

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 12/12/96

ORAL JUDGEMENT

1. The facts leading to this petition may be briefly noticed. The petitioner was appointed as Section Writer in City Civil Court, Ahmedabad on 8.1.1979 and thereafter he was promoted and appointed to officiate as Clerk from 1.4.1980 in the same office. While the petitioner was serving in the City Civil court, respondent issued an advertisement published in Gujarat Samachar on 29.11.1980 inviting applications for the posts of Stenographers

English Grade II by District Judge, Bhuj. In response to that advertisement, the petitioner applied directly for the said post and was selected but no appointment was offered immediately. Another advertisement inviting application for the post of Stenographer English Grade II was issued against which petitioner again applied. The application was forwarded through proper channel vide City Civil Court, Ahmedabad by letter No. 65 of 1982 dated 16.1.1982. Before the interview could be called in pursuance of the second application the petitioner came to be appointed on the basis of earlier selection as Stenographer English Grade II by the office order dated 17.6.1982. On the petitioner's request he received appointment through Principal Judge, City Civil Court, Ahmedabad. On receiving the letter he was relieved from the office of the City Civil Court on 6.7.1982 and resumed his duties at Bhuj under respondent No.1 on 7.7.1982.

2. These facts are not disputed.

3. The petitioner thereafter made an application on 25.8.82 requesting respondent No.1 to treat his service rendered in the City Civil Court as part of his service and to treat his appointment in continuity of the previous service. The petitioner also made an application to the Joint Registrar, High Court of Gujarat, Ahmedabad making a request in this behalf, by letter dated 2.12.1983. He was informed that since he has applied for direct recruitment against first advertisement in 1980 directly and not through proper channel, he cannot be given the benefit of Government Resolution GAD No. FOA-1075/4271 dated 24.1.1967 of counting his past service as continuous for the purpose of fixation of pay and leave. Against this communication, petitioner made a representation before the Honourable the Chief Justice which was rejected, communication of which was made to the petitioner by letter dated 15.3.1985 at Annexure B. In the aforesaid circumstances, petitioner has moved this application. Petitioner contends that his services are governed by the Bombay Civil Services Rules 1959. In exercise of power conferred by proviso to Article 309 of the Constitution of India read with President's order dated 13.5.1971, the Bombay Civil Services Rules were amended with effect from 24.1.1967 and following Note 8 was inserted in Rule 41:

Note: 8 :- If a Government servant working in an office or department is selected for appointment either in the same office or any other office to a service/cadre/post under the Government through

the Gujarat Public Service Commission, Centralised recruitment scheme or any other method approved by Government and if the services rendered prior to and after selection, is continuous without any physical break, the previous service shall count for the purpose of fixation of pay and leave subject to the provision of the Bombay Civil Services Rules, 1959.

Provided that the break which occurred due to the following contingencies shall not be regarded as a physical break but should be treated as joining time for which no pay and allowance shall be admissible.

- (1) Sunday, a holiday intervening the date of relieve from the first post and the date of joining the new post irrespective of the fact whether the charge of the first post was left in the forenoon or the after noon or the charge of the new post is taken in fore noon or taking over the charge of the new post in the afternoon should be only affect the earning of pay and allowance for those days under the provisions of the rule 24 of the BCSR 1959.
- (2) any other day or days for which the Government servant is not allowed to join the new post on administrative ground."

Thereafter clause (1) of Note 8 has further been substituted by the following by the Bombay Civil Services (Gujarat Second Amendment) Rules 1976 with the following:

"Save as otherwise provided in the Bombay Civil Services Rules, 1969 and the Revised Leave Rules 1936, if a Government Servant working in an office or department is selected for appointment either in the same office or any other office to a service/cadre/post under the Government through the Gujarat Public Service Commission, Centralised Recruitment scheme or any other method approved by Government and if the services rendered prior to and after such selection is continuous without any physical break, the previous service shall count for the purpose of fixation of pay and leave.

Provided that the break which has occurred due to the following contingencies shall

not be regarded as physical break but shall be treated as 'Dies non' for the purpose of leave, increment or pension."

According to the learned counsel for the petitioner in view of the specific provision under the Rules, his previous service in the Department of Subordinate Judiciary of the State, ought to have been considered for the purpose of counting continuous service.

4. It has been urged by the learned counsel for the respondents supporting the communication dated 2.12.1983 that the request of the petitioner has been turned down rightly in view of 1967 Government Resolution, petitioner was only entitled to counting of previous service before appointment on selection directly to the post of Stenographer English Grade II. If he had applied through proper channel. It was a condition precedent that he ought to have made application through proper channel, else the Rule would not apply. In the reply affidavit it has been stated that the Government of Gujarat Resolution No. GAD OA 1065-4271/G dated 241.1967 pertains to continuous service without break except of those employees who applied for selection for the post through proper channel that is through the department. It does not apply to those employees who apply directly. The petitioner had applied directly. Government Notification dated 7.8.1971 Exh. G to the petition, Government Notification dated 12.2.11976 at Ann. H are by way of amendment to Rule 41 of the Bombay Civil Services Rules, 1959 and it does not pertain to employees who have applied directly for the post in question as is the case in respect of petitioner. It is also the case of the respondent that the aforesaid Government Notification dated 21.4.1967 is not superceded by subsequent amendment dated 7.8.71 and 12.2.1976 respectively in Rule 41 of the Bombay Civil Services Rules, 1959.

5. Rule 41 of the Bombay Civil Services Rules 1959 deals with fixation of initial substantive pay of a Government Servant who is appointed substantively to a post on a time-scale of pay.

6. It is not in dispute that service conditions of petitioners are governed by B.C.S.R. 1959 and amendment of rules in 1976 is also not in dispute. Therefore, the basic premise on which the contention of learned counsel for the petitioner is founded is that on the date when the petitioner joined services in the City Civil Court Ahmedabad and thereafter on direct recruitment at

District Court, Bhuj, the provision as stated above form part of Rules of 1959. The nature and character of rule making power under Article 309 and Rules framed thereunder are now well settled. Firstly it is only provisions regulating recruitment and conditions of service of persons appointed to public service in connection with the affairs of the State is made by or under an Act of appropriate legislation, the Governor of the State or such persons as he may direct is competent to make Rules regulating the recruitment and conditions of service of persons appointed to service in connection with the affairs of the State.

The Rules framed under Article 309 are statutory and action of the Government in the matter covered by the Rules must be tested on the anvil of the Rules. The rule making function is a legislative function and not executive or administrative function, and rules made in exercise of power under Article 309 constitute law. It is also trite to say that so long as rules under Article 309 are not framed, qualifications may be laid down by executive order, or even where rules are framed under Article 309 but there are matters of recruitment and service conditions in respect of which the rules are silent, it is competent for the Government to fill up the gaps by administrative instructions which it is empowered to issue under Article 162. In *Sant Ram Sharma v. State of Rajasthan and others* AIR 1967 SC 1910, the Apex Court said:

"It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

The ratio was reaffirmed by the Supreme Court in *State of Gujarat v. Akhilesh C. Bhargav and others* reported in AIR 1987 SC 2135 wherein the court said:

"It is well settled that within the limits of executive powers under the Constitutional scheme, it is open to the appropriate Government to issue instructions to cover the gap where there be any vacuum or lacuna."

In *A.K.Bhatnagar and others v. Union of India and others* reported in (1991) 1 SCC 544, the Apex Court said:

"The law is clear that seniority is an incidence

of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the absence of a provision ordinarily the length of service is taken into account."

The Court further emphasised:

"On more than one occasion this Court has indicated to the Union and the State Governments that once they frame rules, their action in respect of matters covered by rules should be regulated by the rules. The rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution are solemn rules having binding effect. Acting in a manner contrary to the rules does create problem and dislocation."

The Court further struck a note of caution and it observed:

"We take serious view of these lapses and hope and trust that the government both at the Centre and in the States would take note of this position and refrain from acting in a manner not contemplated by their own rules."

From the aforesaid it is abundantly clear that the executive instructions issued by the State in exercise of its power under Article 162 can only hold field until rules are framed under proviso to Article 309 which are legislative in nature and have statutory force of law. Once rules come into existence, in the field covered by the Rules they take precedence over any executive instructions on framing of rules, the existing executive instructions in the field covered by rules must give way to rules and it is also prohibited that rules be intermeddled by issuance of executive instructions thereafter in the field covered by rules. Change in the rules can only be made by amendment of the rules and not by executive orders.

Reference in this connection may also be made to I.N.Saksena v. The State of Madhya Pradesh reported in 1967 SC 1264, wherein the Government had issued memorandum regarding the decision of the Government for raising the age of superannuation to 58 years. It also contained another policy decision that appointing authority may require the government servant to retire after the age of 55 years on three months notice without

assigning any reason. It was also stipulated that necessary amendment shall be made in FR 56. Subsequent to the aforesaid memorandum, F.R.56 was amended, however, without incorporating the clause empowering the government to retire a public servant at the age of 55 by giving him three months notice. Thereafter the petitioner appellant, in that case, was retired before completion of 58 years of age issuing three months notice in exercise of instructions issued in the memorandum. The Court rejecting the contention of the State that memorandum itself should be construed as rule, held that the memorandum of February 28, 1963 does not amount to Rules under Article 309. It contains merely executive instructions and the only rule which the Government has made on the question of superannuation is by the notification dated 28.2.1963, that rule would apply to the appellant and it does not empower the government to retire a government servant at the age of 55 years on the three months notice without assigning any reason.

The issue arising out of contention of the respondents in present case is very akin to I.N.Saksena's case referred to above.

It is nobody's case that Government Resolution dated 24.1.1967 ever became a rule under Article 309 of the Constitution. It is true that when instructions contained in Government Resolution dated 24.1.1967 were issued there were no rules on the subject and benefit of past service was only the part of executive instruction issued by the Government in its power under Article 162. It is apparent that until Note 8 was inserted in the Rules of 1959 by notification dated 7.8.1971, to Rule 41, there was no provision in the rules about the treatment of previous service with the Government by a person directly recruited to a post under the Government; whether in the same office or under same Department or different Department. In other words, until the rules were framed in respect of consideration of previous service with the Government in the same office or the Department, the existing rules were silent and the State was competent to issue executive instructions to provide for the same. It was in exercise of the executive power, the State Government had issued instructions directing that previous service under the same office or the same Department or in different Departments under the State Government in any service cadre or post may be counted for the purposes of fixation of pay on the appointment and for the purpose of maintaining his leave account; making it clear that such service cannot be counted for the purpose of seniority. It was also envisaged in these

instructions that this benefit is to go to those employees working in the Government who have applied through the Department. In the absence of any rules in the field it became an administrative order governing the service condition. However, since the field for considering the past services rendered before regular appointment by direct recruitment was made of a person who was already in service of the State, the instructions could not be operated to determine the question whether a person is entitled to benefit of rule X. For the purpose of determining this question whether such appointee is entitled to the benefit of counting past services for any purpose in the service, thereafter one has to look at the Rule alone as it existed at the time of making the appointment. It is not in dispute that at the time petitioner was appointed, the Note 8 to Rule 41 as substituted by Notification dated 12.2.1976 exists which has been reproduced hereinabove. The only condition which was mentioned for counting the previous service as continuous service for the purpose of fixation of pay and leave so that if a Government servant working in an office or Department is selected for appointment either in the same office or in other office to a service/cadre/post in the Government through Gujarat Public Service Commission, Centralised Recruitment Scheme or any other method approved by Government and if the service rendered prior to and after such selection is continuous without any physical break, the previous service shall count for the purpose of pay and leave. The condition of applying through proper channel did not find place in the rule. It is not in dispute that the petitioner was previously in service in the City Civil Court at Ahmedabad which is a service in the Government. It is also not in dispute that the petitioner has been appointed to the post of Stenographer English Grade II by method approved by the Government and it is also not in dispute that he had continued in service without any physical break within the meaning of that Rule. There is no condition that application to the recruitment to the new post ought to have been made through the Department. Any conditions contained in executive instructions prior to insertion of rule cannot govern and inhibit the beneficial operation of the rule nor by the executive instructions, the operation of the rule can be retracted by imposing additional conditions for operation of rules. This alone is sufficient for granting relief to the petitioner.

7. In this connection, it may also be noticed that subsequent to insertion of rule another executive instruction were issued by the State Government on

28.1.1982, which has been enclosed as Annexure F to the petition, containing government instructions about previous service rendered by a direct recruit to the post in the Government under any office or Department of the Government for the purpose of fixation of pay and maintenance of leave account. That instruction is in consonance with the rule referred to above and does not contain any reference to making of an application through Department. The context in which the instruction at Annexure F has been issued refers to the earlier notification dated 24.1.1967. This further indicates that 20.1.1982 resolution of the Government issuing instructions was only clarificatory in the nature about the existing provisions of rules which is to be complied with. It cannot be treated to be an amendment in the notification dated 24.1.1967. It can only be treated to be issuance of instructions in consonance with the existing rules or to say to bring the existing instructions regarding computation of previous service as continuous one in the contingencies referred to in the Rule. Therefore it must be held that when the petitioner was appointed as Stenographer Grade II there was no condition for making an application through Department before the Note 8 to Rule 41 could be operated in his favour.

8. Since the only ground on which the petitioner has been denied the benefit of Note 8 Rule 41 has been found to be not tenable, the petition succeeds.

Respondents are directed to give benefit of his services rendered in the office of City Civil Court, Ahmedabad prior to his appointment as a Stenographer English Grade II in the office of District Court Kutch Bhuj by treating him as continuous in service for the purpose of fixation of pay and leave. Necessary consequential orders may be made by the respondents within one month from the date of service of the writ or furnishing of certified copy of the order by the petitioner. Any arrears which become due as a result of this order shall be paid to the petitioner within a period of three months thereafter. Failure to make payment of arrears which become due as a result of the aforesaid direction within the period fixed shall entitle the petitioner to receive interest on the arrears amount at the rate of 18 per cent per annum from the date of decision until payment. Rule made absolute. No orders as to costs.